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No. 95-8836 (A-890)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

In Re ELLIS WAYNE FELKER

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RESPONSE IN OPPOSITION TO MOTION FOR STAY OF EXECUTION

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OPP

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I.

STATEMENT OF THE CASE

Petitioner, Ellis Wayne Felker, was indicted on May 17, 1982 in the Superior Court of Houston County, Georgia for the murder, rape, aggravated sodomy, false imprisonment and robbery of Evelyn Joy Ludlam. Following the close of the evidence at the guilt-innocence phase of trial, a directed verdict was granted as to the robbery charge. Petitioner was found guilty of the remaining charges and received a life sentence for rape,

a twenty year sentence for aggravated sodomy (to be served consecutively to the rape sentence) and a ten year sentence for the offense of false imprisonment, to run concurrently with the sentence imposed for rape. At the sentencing phase, the jury found the existence of two statutory aggravating circumstances, i.e., that the offense of murder was committed while the offender was engaged in another capital felony, to wit: rape; and that the offense was outrageously or wantonly, vile, horrible or inhuman in that it involved torture or depravity of mind. See O.C.G.A. § 17-10-30-(b)(2) and (b)(7). Petitioner's amended motion for new trial was denied on July 20, 1983.

Petitioner appealed to the Supreme Court of Georgia which affirmed his convictions and sentences in Felker v. State, 252 Ga. 351, 314 S.E.2d 621 (1984). Petitioner's motion for rehearing was denied on March 29, 1984. Petitioner's petition for a writ of certiorari filed in this Court was denied on October 1, 1984.

Petitioner then filed a petition for a writ of habeas corpus on December 17, 1984. (Respondent's Exhibit 1). Proceedings were held on March 25, 1985, March 3, 1986, March 30, 1987 and July 16, 1990. The court denied Petitioner relief on August 9, 1990. Petitioner's application for a certificate of probable cause to appeal from the denial of state habeas corpus relief was denied on September 3, 1991. Petitioner then filed a petition for a writ of certiorari in this Court on

November 1, 1991. The petition for a writ of certiorari was denied on January 21, 1992.

On April 12, 1993, Petitioner served by mail on counsel for Respondent, an application for federal habeas corpus relief to be filed in the United States District Court for the Middle District of Georgia. The district court subsequently allowed the application to be filed and it was stamped filed as of June 2, 1993. On June 9, 1993, the district court entered an order directing the Petitioner to amend his petition within thirty days "to include every alleged possible constitutional error or deprivation entitling petitioner to habeas relief in this court, failing which Petitioner will be presumed to have deliberately waived his right to complain of any constitutional errors or deprivations other than those set forth in his habeas petition." (Respondent's Appendix 1).

On January 26, 1994, the district court denied Petitioner federal habeas corpus relief. Petitioner filed a notice of appeal on February 23, 1994. The district court granted Petitioner's application for a certificate of probable cause to appeal on February 25, 1994.

Petitioner appealed the denial of federal habeas corpus relief to the United States Court of Appeals for the Eleventh Circuit. Following oral argument, the Circuit Court affirmed the denial of federal habeas corpus relief in Felker v. Thomas, 52 F.3d. 907 (11th Cir. 1995). On Petitioner's petition for a

rehearing and suggestion of rehearing en banc, the Eleventh Circuit addressed Petitioner's contentions, but extended the original panel opinion in Felker v. Thomas, 62 F.3d. 342 (11th Cir. 1995). Petitioner then filed a petition for a writ of certiorari in this Court seeking review of the two opinions of the Eleventh Circuit. Certiorari was denied on February 20, 1996 and Petitioner's petition for rehearing was denied on April 15, 1996.

Petitioner's execution period was set for May 2, 1996 through May 9, 1996. On April 29, 1996, Petitioner filed a motion for access to conduct a mental health evaluation of Petitioner and a petition for state habeas corpus relief in the Superior Court of Butts County. Respondent filed a motion to dismiss this petition as successive and for failure to state a claim as to certain issues.

On April 30, 1996, Petitioner filed an amended petition for a writ of habeas corpus and Respondent filed an amended motion to dismiss the petition as successive under state law on May 1, 1996, prior to the hearing previously scheduled by the court in connection with Respondent's motion to dismiss. Following the hearing conducted on May 1, 1996, the state habeas corpus court found the Cage issue to be without merit and the remaining issues to be successive and subject to dismissal under Georgia's successive petition rule. On May 2, 1996, the Supreme Court of Georgia denied Petitioner's application for a

certificate of probable cause to appeal and denied Petitioner's motion for stay of execution.

Petitioner lodged in the Eleventh Circuit on May 1, 1996, an "Application for Permission to File a Second Habeas Corpus petition in the district court and for Stay of Execution." The Respondent Warden in that action lodged a response on May 1, 1996.

REASONS FOR NOT GRANTING A STAY OF EXECUTION

Comes now, State of Georgia, through Michael J. Bowers, Attorney General for the State of Georgia in response to what has been styled as an original, but successive, application for a writ of habeas corpus filed in this Court and shows and states the following:

In a blatant attempt to circumvent the new habeas corpus rules, Petitioner has filed an original application for federal habeas corpus relief in this Court. No stay of execution should be granted to review this application. First, insofar as this Court may construe this action as an attempt to seek review of the decision of the Eleventh Circuit applying the new AntiTerrorism and Effective Death Penalty Act of 1996, this action would have to be construed as in actuality consisting of a petition for a writ of certiorari. Under the new habeas corpus rules contained in the Act, petitions for rehearing or certiorari are prohibited from a decision of a circuit court of appeals denying authorization to an applicant to file a second or successive application. See Section 106. The Eleventh Circuit has declined to authorize the filing of a successive petition in the district court. That decision is not reviewable and therefore, no stay of execution should be granted for that purpose.

Despite his inclusion of two claims in this application which purportedly challenge the state court judgment in question, Petitioner's real purpose is to challenge the constitutionality of the new rules which he has admitted apply to his successive application for federal habeas corpus relief. This Court should not allow itself to be used to thwart the new statutory scheme designed to expedite the consideration of, particularly successive, applications.

Despite what labels may be attached under the old or new statutory schemes to Petitioner's conduct, Petitioner is seeking to stay his execution based on two issues which Petitioner could have been raised three years ago when filing his first federal petition. No stay of execution is authorized to allow Petitioner's claims in this successive petition to be reviewed.

In opposing the granting of the stay of execution, Respondent maintains his position that the new rules are constitutional, that Petitioner is not authorized to have his successive application reviewed, and further, that if reviewed, there is no reasonable likelihood of his success on the merits of the claims being raised.

Should this Court desire further response on any issue or on the "petition for writ of habeas corpus," Respondent will submit one on request.

CONCLUSION

Wherefore, for all of the above and foregoing reasons, Respondent prays that this Court deny Petitioner's request for a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served
the within and foregoing Response, by facsimile upon:

M. Elizabeth Wells
Stephen C. Bayliss

This 2 day of May, 1996.

Susan V. Boelyn
SUSAN V. BOLEYN
Senior Assistant
Attorney General